Neutral Citation Number: [2017] EWCA Civ 96

Case No: A3/2015/2548 & A3/2015/2791

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QBD, COMMERCIAL COURT
Mr Justice Males
2013FOLIO493

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2017

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LEWISON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

Axa Versicherung Ag	**Appellant**
- and -	
Arab Insurance Group	**Respondent**

- -
- -

Charles Kimmins QC and **Michael Holmes** (instructed by **Wynterhill LLP**) for the **Appellant**
Simon Bryan QC and **Guy Blackwood QC** (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

Hearing dates : 31st January and 1st February 2017

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Judgment Approved

Lord Justice Christopher Clarke:

1. The question in this case is whether Males J was entitled to conclude that a reinsurer to whom an unfair presentation of the risk was made had failed to establish that he would have declined the risk if a fair presentation had been made to him by the reinsured.

The history

2. The reinsured was Arab Insurance Group (B.S.C.) ("Arig"). Arig was a well-regarded insurance and reinsurance company domiciled in Bahrain. Between 1989 and 1993 Arig insured a substantial number of energy construction risks. These comprised rig building, pipeline construction, platform construction and construction liability risks. In 1989 some 40 such risks were written.

3. Until 1 January 1991 the head of Arig's underwriting department was Bjorn Simenstand. He fled Bahrain when Iraq invaded Kuwait. After a gap of six months, on 9 June 1991 Lars Hylander ("Mr Hylander") replaced him. Masoud Bader ("Mr Bader") was one of the other underwriters.

4. On 4 September 1996 Albingia Versicherungs –AG ("Albingia") subscribed to a 50% line on a first loss treaty with Arig. Albingia was, at the time, a medium sized German insurance company based in Hamburg. Its successor in title is AXA Versicherung AG ("Axa"), the now appellant, which purchased Albingia in 1998. In 1997 Albingia subscribed to a second treaty. The underwriter who determined that Albingia should enter into those treaties was Thomas Holzapfel ("Mr Holzapfel").

The treaties

5. The first treaty was a facultative/obligatory first loss treaty covering marine energy construction risks attaching between I January 1996 and 30 June 1997. It applied to the first $ 500,000 of losses for any one accident or occurrence. Under the treaty Arig could choose what risks to cede. Albingia would be bound to accept them and would bear 50% of the losses on the risks ceded up to $ 500,000 (the 100% figure) per accident or occurrence. Since there was no deductible under the treaty the losses reinsured were "from the ground up", although there may have been deductibles under the inwards insurances written by ARIG which would reduce what would otherwise have been the losses thereon.

6. The second treaty was the 1997 renewal of the 1996 treaty. It covered risks attaching during the period from 1 July 1997 to 30 June 1998.

7. First loss treaties are not easy to place, for two reasons. First, and particularly if they have no deductible, the reinsurer may find himself wholly liable for a large number of relatively small losses ("attritional losses"). Secondly, the reinsured has, to the extent of the limit of the cover, "no skin in the game". Thus, in this case, in respect of losses up to $ 500,000 Arig bore no loss at all. This is to be contrasted with a quota share treaty where, although the reinsurer in a sense "hands his pen" to the insurer's underwriter, there is a sharing of profit and loss which provides an incentive to the reinsured to do everything possible to secure the former and avoid the latter.

8. Arig's underwriting results in respect of marine energy construction risks (ignoring reinsurance recoveries) for the 1989 to 1992 period were extremely poor. The figures as at the end of 1995 were as follows:

u/w year	*Risks written*	*Net premium to Arig (US $)*	*Losses incurred (US $)*	*No. of losses*	*Loss ratio*
1989	40	1,932,171	8,185,066	169	**424%**
1990	39	2,889,026	6,503,736	168	**225%**
1991	31	3,102,597	3,385,176	116	**109%**
1992	23	2,072,450	1,353,153	42	**65%**
1993	19	1,935,360	235,531	5	12%
1994	1	116,244	0	0	0%
1995	3	109,422	0	0	0%

I call this the "voluntary particulars table".

9. These figures deteriorated further in 1996. To some extent the losses set out in the table would have been mitigated by the first loss reinsurance cover which Arig had between 1 October 1989 and 30 September 1992 in respect of construction risks.

The broking history

10. By 1995 Arig, which had written very few risks in 1994 and 1995, was keen to re-enter this market, and to reduce its exposure by obtaining reinsurance. In February 1995 Arig instructed Swire Fraser as brokers.

11. The history thereafter is described in the following paragraphs of the judge's judgment where he said that Arig's attempts to obtain reinsurance:

> *"36 ...appear to have begun in about February 1995 when Mr Masoud Bader, an underwriter in Mr Hylander's department, indicated the broad scope of the cover which Arig was seeking in a fax to Mr Tony Rowe, a director of the reinsurance broker Swire Fraser. Arig was seeking a 12-month cover on a risks attaching basis for "primary/ground-up" offshore construction risks, with a limit of US $5 million. This limit was expressed to be the limit for 100% of the risk, though it was contemplated that Arig's line would generally be for a lesser proportion and could be limited to a maximum of US $2 million. This could no doubt have been subject to negotiation if matters had proceeded further. Mr Bader indicated that the estimated annual premium income to Arig would be about US $500,000 to US $750,000.*
>
> *There is no evidence of what, if anything, Swire Fraser did in response to this request until late October 1995 when it was discussed by Mr Bader and Mr Rowe at a meeting in London of*

> *which no record survives. Mr Bader gave evidence, but had no recollection of this meeting. However, on 31 October 1995 Mr Rowe wrote to Mr Bader identifying the information which Swire Fraser would require in order to market such reinsurance cover. The list included "triangulated figures on the overall account", which is another way of referring to loss statistics on Arig's existing book of inwards energy construction risks."*

12. Mr Bader of Arig obtained the underwriting statistics and sent them to Mr Rowe with an email of 16 November 1995. The judge set out the cumulative figures in the following table:

U/w Year	***Net premium***	***Paid claims***	***Reported losses***	***Total losses***
1989	1,784,086	6,185,793	1,732,845	7,918,638
1990	2,883,273	4,972,918	1,509,524	6,482,442
1991	3,102,597	2,159,882	1,272,926	3,432,808
1992	2,071,049	823,181	813,963	1,637,144
1993	1,936,220	102,557	139,653	242,210

I call these "the Swire Fraser statistics".

13. The table in [12] gives the cumulative figures as at towards the end of 1995. More detailed statistics were contained on one page of the attachment to the 16 November email headed "Underwriting Statistics". That page gives the figures year by year of Net Premiums, Paid claims, Outstanding claims (which appear in the above table as "Reported losses) and "Reported losses" (which appear in the above table as "Total losses"). Another table attached to the email headed "Actual Statistics" gave cumulative figures for Premiums and Reported losses (i.e. the equivalent to Total losses in the table above) and calculated a loss ratio both for all losses and for the first $ 5,000,000. In respect of the latter there were loss ratios of 122.65% and 190.45% for 1989 and 1990. These ratios appear to assume, contrary to what must be the position, that the reinsurer in respect of the first $ 5,000,000 receives all the premium. This table has figures for 1989 which differ somewhat from those in the table above.

14. There are differences between the voluntary particulars table - see [8] above - and the Swire Fraser statistics at [12] above. The figures are slightly different, no doubt because the first table is taken up to the end of December 1995 rather than November 1995 or earlier. More significantly the former table specifies the number of risks written, the number of losses and the loss ratio, which are material considerations, and the position for 1994 and 1995 which the Swire Fraser statistics do not.

Mr Bader's "As ifs"

15. Mr Bader also provided some statistics designed to show the basic 1989 – 1993 figures in a more favourable light. First, he omitted losses where Arig's share of the loss was less than $ 50,000; then he adapted those figures by using current deductibles ($ 500,000 for pipeline laying and $ 250,000 for offshore construction); and then a

fixed $ 1 million deductible. Second, he used current premium rates, which were taken as double the rates originally used. Third, he used those rates and current deductibles. Lastly, he used current rates and a fixed $ 1 million deductible. I call these "Mr Bader's as ifs". As the judge pointed out [41] there was nothing wrong with using these ways of presenting figures alongside the actual losses so long as it was made clear what each set of figures represented.

16. It has become apparent that the use of the phrase "as if figures" is ambiguous and apt to confuse since it may be unclear what adjustment to what figures the phrase is said to represent.

17. The Swire Fraser broke was not successful. On 28 November 1995 Mr Rowe reported that he had spoken to a few potential underwriters and that the underwriter showing the most interest had asked for more particulars of the rate rises for construction risks over recent years and more information about the deductibles which Arig had identified. The broke petered out. The judge concluded that no reinsurer who was approached was prepared to quote for the business.

The Quota Share Treaty

18. In November 1995 Arig sought to renew its existing quota share energy treaty in the market, using Newman, Martin & Buchan ("NMB") as broker. This reinsurance protected Arig's energy account as a whole. So, it included both operating and construction risks. The latter are riskier than the former. In November 1995 Mr Hylander sent a fax to Mr Chris Martin at NMB which included a risk profile by type and location of risk for the 1995 account. It listed 81 risks of which only two were construction risks. Treaty statistics provided for the years 1990 to 1995 (last three quarters only) showed loss ratios of below 100% (although for 1990 and 1991 the ratios were 93.47% and 90.13%).

19. NMB offered Mr Holzapfel of Albingia the opportunity to participate in the quota share for the next policy year. After a certain initial lack of enthusiasm Mr Holzapfel indicated a willingness to write a 35 % line on the treaty for the 1996 year. The risk proved popular with others and Albingia's proposed line was signed down to 19.57%.

The conclusion of the 1996 first loss treaty.

20. In April 1996 Mr Bader of Arig approached Mr Stow of NMB with a view to concluding a first loss treaty. The two of them decided that the reinsurance should be broked without reference to, or disclosure of, the historic loss statistics on Arig's inwards book of construction risks.

21. The judge heard from both Mr Bader and Mr Stow. Their evidence was, in general terms, that Mr Bader had explained to Mr Stow that Arig's approach had changed considerably such that energy construction loss information relating to earlier years would be unhelpful or misleading in relation to a treaty taking effect in 1996. The judge thought it much more likely that no conversation along those lines had taken place. He found, in particular, that nothing was said to Albingia about any change of strategy, or to indicate that any past loss statistics existed.

22. NMB first approached Albingia in connection with the proposed treaty on 17 July 1996. By then NMB had already approached a number of reinsurers who were not interested.

23. The covering sheet of the fax sent by NMB stated under the heading "*Arig (Bahrain) Construction Treaty*" the following:

> *"We are very pleased to be able to offer you an opportunity to participate in the captioned new treaty.*
>
> ***This is a new Treaty for the Reassured and as such does not have a corresponding loss record.***
>
> *Note that this is anticipated to be a small proportion of the Reassured's overall Energy Account Income and will comprise of approximately 30 to 40 risks. 15 have already been written since 1.1.96 and ARIG would like to attach this contract at 1.1.96 to include them. Obviously this is subject to no known or reported losses.*
>
> *We have also included a schedule of benefiting XL reinsurances which leave Treaty Reinsurers with a manageable retention – currently these are only desk quotes.*
>
> *Trust you find all in order and look forward to your advice."*
>
> [Bold added here and elsewhere]

24. The judge summarised what came with the fax in the following terms:

> *"69 The fax included a draft reinsurance slip including a rating scale, additional clauses applicable to the treaty, a rating scale graph, the schedule of proposed excess of loss reinsurances and a list of 15 energy risks already written and intended to be ceded to the proposed treaty, setting out the name of the project, inception, expiry, and Arig's exposure and premium. The offered treaty was a reinsurance declaration treaty protecting Arig for "Construction, Installation, Commissioning and Maintenance, plus Operating Exposures as advised". The draft slip did not expressly refer to energy construction but the covering fax and excess of loss order form made it clear that the proposal related to energy construction business written by Arig. It was proposed to cover losses occurring on risks attaching during the period of 18 months from 1 January 1996, thus having retroactive effect back to the start of the 1996 year but subject to the qualification that there were "no known or reported losses at date of order". The draft*

> *provided for a maximum original policy period of "36 months, plus discovery/maintenance period": in other words, the direct insurance was to cover projects with a construction period of three years, together with a further period after completion in which defects might be discovered. The limit of the treaty was "US $500,000 any one unit and/or item and/or structure or currency equivalent each and every loss, any one accident or occurrence" and the offered treaty was a first loss treaty, meaning that Albingia would pay the first US $500,000 of each and every covered loss suffered by Arig. No information was provided about the level of deductibles already written or expected to be written by Arig and thus the level at which losses would begin to be suffered by Arig. There was no disclosure of any loss statistics for energy risks previously written by Arig."*

25. On 18 July 1996 Ms Jerabek, an underwriter at Albingia, having previously obtained approval from Mr Holzapfel, confirmed to NMB that Albingia was prepared in principle to write a 50% line on the treaty provided that (i) Arig's ceding commission of 2.5% was removed; (ii) the rates offered for Albingia's excess of loss protections were improved; and (iii) RPP cover was available at an affordable price.

26. Eventually, as the judge found:

> *"74 On 3 September 1996, Mr Stephenson of NMB sent a fax to Ms Jerabek [at Albingia] including a revised slip and order for excess of loss reinsurance for US $350,000 in excess of US $150,000. He confirmed that the other 50% of the treaty had been placed with Rhine Re. There is no surviving documentation or evidence about the way in which the business was broked to Rhine Re.*
>
> *The slip was signed by Ms Jerabek on 4 September 1996 confirming Albingia's 50% line. She also signed the order for excess of loss protection. She probably did so without needing to consult further with Mr Holzapfel, who was in London at the time."*

27. The judge accepted that the underwriting decision to participate in the treaty was that of Mr Holzapfel.

The 1997 Renewal

28. On 27 June 1997 NMB invited Albingia to renew the 1996 first loss treaty for risks attaching during a further period of 12 months from 1 July 1997. The terms were amended to allow policies with a duration of up to four years, increased from three, plus discovery/maintenance period as original. NMB attached a table of the accounts

declared to the 1996 treaty in relation to which some 49 risks had been declared. The fax also stated that there was only one claim at that stage being for $ 55,283.

29. The renewal was accepted and on 10 July 1997 Ms Jerabek signed and stamped the slip for Albinigia's 50% line for 1997.

1998

30. When it came to the 1998 first loss treaty renewal Albingia decided not to renew. By then there had been two major losses both to the 1996 treaty. Claims under the 1996 treaty exceeded $ 1.1 million and even with the benefit of the excess of loss protection the treaty was already making a loss only two years after it had been written. The 1997 Treaty had only suffered losses of $ 95,000 but the premiums on risks declared to the treaty after only three quarters were less than $ 70,000 on a net basis which barely covered the cost of the excess of loss cover. Between them the two treaties were showing a current loss of just under $ 150,000.

Later events

31. The judge described what happened as follows:

> *"91 As time went by, losses continued to mount. Between 26 February 1998 and 6 November 2006, Albingia and subsequently Axa paid total claims to Arig of over US $2.5 million under the 1996 treaty and over US $3.2 million under the 1997 treaty. As losses continued, Axa began to question entries and figures in Arig's treaty statements and made various requests for information and clarification relating to claims for which payment was sought. The process of obtaining information proved extremely slow, mainly due to delays by Arig in responding to Axa's requests. It is unnecessary for the purpose of this judgment to recite the detail. Axa's principal concern was that certain claims made by Arig under the treaties appeared to relate to risks which had not been ceded to the treaties prior to notification of the loss. It had no suspicion or grounds for suspicion at this time that there might have been a failure to disclose material facts or misrepresentation at the time when the treaties had been concluded."*

32. Eventually in an email of 14 July 2010 Axa reserved all its rights. After an inspection of Arig's records, Axa commenced this action on 5 April 2013, claiming a declaration that it had validly avoided the treaties.

Axa's case on non-disclosure

33. The basis upon which Axa claimed to be entitled to avoid the treaties was for non-disclosure, or a misrepresentation as to the existence, of loss statistics relating to Arig's existing book of inward marine energy construction risks written during the

period 1989 to 1995. Its case on misrepresentation focused on the words used by NMB when the 1996 treaty was first proposed to Albingia:

> *"This is a new Treaty for the Reassured and as such does not have a corresponding loss record"*

34. Axa's case was that those words constituted a representation to the effect that Arig had no loss statistics for energy construction risks of the kind which would be declared in the 1996 treaty – which was untrue. The judge decided against Axa on this point. He preferred Arig's case, which was that the words meant no more than that, because the treaty was a new one and not a renewal of an existing treaty, Arig had no records of losses incurred under the treaty in previous years. But he said that he could well understand that Albingia may not have focused on the precise meaning of the statement in the same way as he had had to do, and that it would not be surprising if Mr Holzapfel or Ms Jerabek had understood NMB to be saying that Arig had no past loss statistics for energy construction risks. The judge found it impossible to determine whether either of them in fact had that understanding at the time.

35. In relation to past loss statistics Arig's case was that, in the particular circumstance of this case, disclosure of historic loss statistics would not have influenced the judgment of a prudent underwriter considering whether to write the 1996 or 1997 treaties. The judge rejected this submission for the reasons set out at paragraphs 138-144.

36. The next question was what a fair representation would require to be disclosed and, in particular, whether it would have required Arig to disclose the far worse 1989 and 1990 figures as well as those going back to 1991. On this the judge concluded "*on balance"* that the 1989 and 1990 losses ought to have been disclosed as well as those for later years if the presentation was to be fair, despite Mr Outhwaite's evidence, in which the judge saw some force, which was that normally only five years of statistics are presented.

Inducement

37. As the judge said:

> *"158 Accordingly, the relevant question on the issue of inducement is whether Albingia has discharged the burden of proving that if the 1995 loss statistics going back to 1989 as set out in the table at [32] above had been disclosed, together with whatever fair explanation would also have been given of those figures, Mr Holzapfel would not have written the 1996 treaty or would have done so on different terms.*
>
> *159 Mr Kimmins submitted on behalf of Axa that, if the 1989 and 1990 figures had to be disclosed, Albingia would certainly not have written the 1996 treaty. It would be, in his words,*

> *"game over". I do not accept, however, that this is a fair reflection of the evidence. I begin by examining what Mr Holzapfel said about this and then consider some of the other factors which would or might have had a bearing on this question".*

The figures "*in the table at [32] above*" are the figures in the voluntary particulars table.

The Arig reconstruction "As ifs"

38. For the purposes of the trial Mr Hylander was asked by Arig's lawyers to review each of the 21 energy construction risks written during the six months before his arrival as well as those written afterwards in 1991, 1992 and 1993. He provided his comments upon many but not all of those risks. Based on those comments Arig's lawyers prepared a series of schedules designed to show which of the risks written from 1 January 1991 onwards would have been written by Arig if Mr Hylander's more conservative approach had been in place from that date. The result of this exercise was to show loss ratios of less than 30% for the 1991 and 1992 years, or on slightly different assumptions 40%, instead of the figures in the voluntary particulars table of 109% and 65%. I call these statistics the "Arig reconstruction as ifs".

39. The judge considered this attempted reconstruction as essentially a matter of submission with only limited evidential support, "*of very little value*" and "*highly speculative*". He thought that the reaction of Mr Holzapfel when first told about this exercise in cross examination was telling and likely to have been the first reaction of a reasonable reinsurer. That reaction was:

> *"Let me guess, without having gone through that, he would only have written the risks with the best performance and ceded them to the first loss treaty, is that right?"*

40. Mr Stow gave evidence that there had been occasions on which he had performed a similar exercise in the past; but nothing of the kind was prepared at the time of the broke to Albingia or disclosed to it and it had never occurred to Mr Bader or Mr Stow to undertake such an exercise on the original broke. In addition, as the judge found, there were flaws in the exercise because (a) it made no attempt to assess whether risks accepted by Mr Hylander's predecessor would have been accepted under Mr Hylander's new approach and (b) it assumed that Mr Hylander would not have written a small number of risks which he did in fact write in 1993 after his new and more conservative strategy was in place.

41. However, the judge accepted [111] that Mr Hylander did seek to introduce a more rigorous and selective underwriting policy than his predecessor had followed and that he was successful in doing so. But he held that it was not possible now (nor would it ever have been possible) to demonstrate in any concrete or quantifiable way what

impact his policy would have had if it had been in place during the period from 1989 to 1992. There might be thought to be a tension between these two findings. However, the judge was concerned with the position in 1996 by which time the policy had had over 3 more years to develop. In the last two of them few construction risks had been written, a fact consistent with a change of policy.

42. In relation to inducement the judge recorded that in his first witness statement Mr Holzapfel had said [189] that if Arig's historic loss record as at 31 December 1995 had been included in the NMB fax offer of 17 July 1996 he would probably have instructed Ms Jerabek to decline the offer. That evidence was not, the judge found, difficult to accept in isolation but it assumed that the figures were presented without explanation which was not the relevant scenario. I refer to this evidence and what the judge said about it in [115] below.

43. The judge then summarised the cross examination of Mr Holzapfel in the following terms:

> *"161 In cross examination Mr Holzapfel was first asked some general questions about how he would have reacted if he had been told by Mr Stephen Card, a broker at NMB whom he knew well, that Mr Hylander had implemented a conservative underwriting approach. His response was that he would have wanted to know more about this new approach, how it differed from what had gone before, and what it was intended to achieve, but that he* ***would have accepted what the broker had said****. When he was asked to assume that he had been told that before Mr Hylander joined Arig its underwriting had been somewhat directionless but that Mr Hylander had taken over in mid 1991, Mr Holzapfel said that he would still have wanted to see the company's performance on its prior underwriting, but that such disclosure would have been the basis for a discussion ("put the facts on the table first, and then we can discuss how things will develop into a wonderful world going forward"). If he had been told that Mr Hylander was "focusing on" (not necessarily writing exclusively) shallow water risks, relatively benign weather areas, tested technology and narrow bore pipelines*[1]*,* ***that was something on which he would have placed reliance.***
>
> *162 He was next asked for his reaction to the Arig reconstruction, which he had not seen before, and which went back only to 1991. I have already recorded his initial reaction at [106] above. He remained sceptical about this kind of hindsight exercise. Subsequently, however, when asked to assume that as well as the actual figures going back to 1991 the NMB presentation had included information that Mr*

[1] Mr Hylander gave evidence to that effect.

> *Hylander had only taken over in 1991 after which he had implemented a new strategy, which if applied to the 1991 and 1992 years would have resulted in loss ratios below 30% (as in the Arig reconstruction), Mr Holzapfel said that Albingia* ***would probably have written the risk on the same terms which it did."***

The evidence that led the judge to reach these findings was at Day 3/149 -150; 153; and page 168, lines 1-19.

44. As is apparent the hypothesis of this cross examination was that Mr Holzapfel was shown figures going back to 1991 with the information that there was a new strategy which if applied as in the Arig reconstruction "as ifs" would produce loss ratios overall below 30%. The reason why the cross examination took that form was because it was Arig's case that a fair presentation would not require the revelation of the statistics for 1989 and 1990.

45. But that was not the limit of the disclosure that the judge, rejecting Arig's submissions, was destined to find was required. Perhaps anticipating this, at the end of his cross examination the judge asked a series of questions which he summarised in paragraph 163:

> *"Finally, the scenario was put to Mr Holzapfel [by the judge] that he had been told that Arig had written a number of energy construction risks in the past between 1989 and 1993, but had written hardly any in 1994 and 1995; he had been shown the loss records which had been provided to Swire Fraser (see [38] to [40] above****); and he had been told*** *that although the loss figures for some of the underwriting years shown in those records were very bad, in 1991 there had been a change of underwriter at Arig and the new underwriter was adopting a more rigorous and selective approach to the risks which he was prepared to accept, so that quite a number of the risks which the previous underwriter had been prepared to accept would probably not have been accepted under the new approach.* ***That or something like it would in my view have represented a fair presentation of the risk****. Mr Holzapfel's answer was that he did not think that he would have entered into a relationship with Arig on the first loss treaty, because Arig had demonstrated that it was not able to manage the business properly over time. Although that represented Mr Holzapfel's view when the scenario was put to him, and was to some extent only a tentative view, I find his answer difficult to understand. The scenario was that there had been a period of poor underwriting decisions with an underwriter following what turned out to be a bad policy, but that the situation had been*

> *managed by the introduction of a new underwriter who was successfully implementing a more rigorous approach".*

46. This paragraph contains a summary of the disclosure that the judge found to be necessary for a fair presentation. There are, however, a number of problems with it.

47. The first is that the loss records to which the judge refers in that paragraph are those referred to in paragraphs 38 to 40 of his judgment. These are the Swire Fraser statistics set out in [12] above and not the voluntary particulars table, which was at paragraph [32] of the judgment.

48. Second, the finding is that the presentation which the judge was putting to Mr Holzapfel "*or something like it*" would constitute a fair presentation. It is not clear whether the judge was in any way retreating from his finding at [158] of his judgment that the question was whether Albingia had shown that if the voluntary particulars table had been shown to him Mr Holpazfel would not have written the risk. I cannot regard him as having intended that. Any rate, if we have to decide which of two inconsistent findings should prevail it seems to me that it is the finding at [158] which covers figures to the end of 1995 rather than some earlier date. I would read the phrase "*or something like it*" as allowing for the figures which the judge had already found should have been disclosed to be treated as the applicable ones.

49. Third, in paragraph [152] of his decision the judge had considered whose decision was relevant, Mr Holzapfel's or Ms Jerabek's. He observed that there were three different issues in relation to which their respective roles might need to be considered. As to this he said that:

> *"The third is the issue of inducement which, as already noted, is hypothetical – what would have happened if a fair presentation had been made.* ***A fair presentation would have involved at least the presentation of some past loss records, together with at least some "as if" statistics and some explanation of the change in underwriter and change in strategy.*** *In that hypothetical scenario I am confident that the decision would have been referred to Mr Holzapfel* ***and that he would have looked at the position with care****. That would be so even if, as Arig contended, there was in fact minimal or even no involvement by Mr Holzapfel in the actual writing of the risk in the circumstances in which it was actually presented, and all relevant decisions were in fact taken by Ms Jerabek. To that extent, the factual issue as to who in fact made the decision to accept the risk as it was actually presented is largely irrelevant".*

50. The reference to some "*as if statistics*" in that paragraph is unclear in two respects. First it is not clear what "*as if statistics*" the judge was referring to. Second, when,

later in the judgment [163], he came to indicate what would amount to a fair presentation of the risk, no reference was made to any "*as if statistics*" of any kind.

51. A further problem is that the judge found Mr Holzapfel's answer hard to understand, by which I take him to mean that he thought it was either false or illogical or such that it could not be accepted as reflective of what would have been his position on the assumption put to him. This was however not suggested to Mr Holzapfel when he gave evidence.

52. The judge then turned to consider the factors other than past loss statistics which would or might have been relevant. As to that he singled out three factors. The first was that it would have been an obvious element of any broke intended to put the Arig loss figures in a less damning light that Albingia had an existing relationship with Arig through the 1996 quota share treaty. The fact that the treaty had been oversubscribed represented a vote of confidence in Arig "*of which NMB would have been able to make some play*": [165] of the judgment. Mr Holzapfel knew that by accepting a substantial line on that treaty he was reposing a significant degree of trust in Arig's ability to write construction risks. The quota share presentation showed that Arig's existing book consisted almost entirely of operating risks but energy underwriters were moving away from operating risks in favour of riskier construction risks as Mr Holzapfel knew.

53. The second highly significant matter, the judge held, was that, although when he had sought (successfully) to avoid a first loss treaty, called the Copping treaty, Mr Holzapfel had described a deductible of $ 500,000 as "*an absolute essential feature of writing the business and distancing ourselves from attritional claims*", in the case of the Arig treaty he never asked for information about the deductibles applied. That showed the danger of focusing on isolated facts such as, in the Copping case, deductibles or, in this one, loss records when attempting to answer a hypothetical question many years after the event. It also illustrated that apparently categorical evidence given in good faith, "*may be, if not downright wrong at least not the whole story*".

54. Next, he observed that, although Mr Holpazfel had insisted that cash flow had not been an important factor in deciding what risks to accept, it was apparent from contemporary documentation that this was indeed a factor of some importance, albeit secondary to his assessment of the likely profitability or otherwise of the risk. In the case of the 1996 loss treaty NMB would have been able to point to the cash flow advantage of the fact that Arig had written a number of risks which were to be ceded to the treaty, thus providing immediate premium.

55. The judge expressed his conclusions on inducement in these terms which, for reasons which will become apparent, it is appropriate to set out in full:

> *"Conclusions on inducement.*
>
> *From all this material, I draw the following conclusions.*
>
> *First, despite his honesty as a witness, it is not safe to rely on Mr Holzapfel's assertions as to whether or not he would have*

written the risk in the various scenarios about which he was asked. It is easy for an underwriter, focusing twenty years after the event on a single issue such as poor loss records and inevitably affected to some degree by hindsight, to express a genuine and firm opinion that if he had known about such records, he would never have written the business. However, the environment of a trial cannot faithfully recreate all the circumstances as they would actually have existed, at any rate when the trial takes place so long after the event that the underwriter in question has no recollection at all of the actual transaction.

Second, Albingia did in fact write the treaty despite the absence of any information at all about one factor, namely Arig's approach to the deductibles in its original policies, which both in this action and elsewhere Mr Holzapfel has described as an important consideration. It follows that even matters which in general he would regard as essential may in some circumstances not be so.

Third, Mr Holzapfel regarded Arig as a high quality reinsured which in general he was keen to support. Whether or not he knew Mr Hylander (he said that he did not know of him, although that seems surprising) he must have satisfied himself that it was a well-managed company with competent underwriters when agreeing to write a substantial line of the quota share treaty.

Fourth, Mr Holzapfel was a fair minded man who would have been willing to listen to whatever explanation of poor loss records the broker (with whom he had a good working relationship) provided and to consider it on its merits. Indeed, he had done precisely this in the case of the Copping first loss treaty where there were poor loss records but where Albingia nevertheless agreed to take a line of 50%: see [49] above.

Fifth, NMB ***could (and would)*** *fairly have explained that the poor results achieved by Arig were on risks written for the most part under a previous underwriter and that Mr Hylander, following his arrival in 1991, had adopted a more rigorous and selective approach and, moreover, an approach to energy risks in general which had satisfied Mr Holzapfel for the purpose of writing the quota share treaty.*

Sixth, in addition, NMB ***could have made*** *the point made in evidence by Mr Outhwaite that the particularly bad results achieved in the 1989 and 1990 years reflected not only the premium driven strategy of the previous underwriter but the adverse market conditions and disastrous losses sustained on risks written during those years by the market in general, which*

> *were not comparable with the situation as it was believed to be in 1996.*
>
> *Seventh, although first loss reinsurance on energy construction risks was a particularly hazardous kind of reinsurance to write, and many underwriters were not willing to do so, Mr Holzapfel was not of their number. On the contrary, he wrote a number of such treaties and was not averse, therefore, to running such risks.*
>
> *In all those circumstances there is in my judgment real doubt as to what Mr Holzapfel would have done if a fair presentation of Arig's past loss records going back to 1989 had been made to him, together with the explanatory points which Arig or NMB on its behalf* ***could fairly have made.*** *It is not a plain case in which the answer is obvious. In the end I am not persuaded that it is more likely than not that he would have refused to write the treaty, or would only have done so on different terms. It follows that Axa's case for avoidance of the 1996 treaty must fail".*

Ground 1 of the appeal

56. The first ground of appeal was that the judge had applied the wrong test by deciding what **could** have been said if the 1989-1995 statistics had been produced, when the relevant test was what **would** have happened. References to what could have been said appear in paragraphs 177 and 179 of the judgment and also, in effect, in paragraph 165 ("*of which NMB would have been able to make some play")* and in paragraph 170 ("*NMB would have been able…to point to the cash advantage"*). Reliance was placed on the fact that when Counsel was asked by the judge whether the question was what could or what would have been said, Counsel for Arig accepted off the cuff that the answer was "would".

57. As I indicated during the course of the hearing it seems to me that, where there has been an unfair presentation of the risk, there are three issues in relation to which the could/would argument may be relevant.

58. The first is that the court has to determine what needed to be said in order for the presentation to be fair. That, in my view, is an objective question. If any modal verb is to be used, the question is what should have been said. Whether a presentation was unfair because it omitted a material fact and, if not, what was required to make it fair, should each be viewed objectively from the standpoint of the reasonable and prudent underwriter. He is the deemed recipient of the actual (unfair) presentation and his expectations should determine what needed to be said in order to make it a fair one. What needs to be said for that purpose is not necessarily limited to revealing the negative characteristics of the risks not mentioned on the actual presentation, since some positive qualification of those characteristics may be necessary in order that the hypothetical presentation is not, itself, unfairly prejudicial.

59. The second is that, in considering whether the unfair presentation induced the underwriter to write the risk, the court may have to consider what, if there had been a fair presentation, the insured or his broker would have said in addition to that which was necessary to make the presentation fair, in order to encourage the insurer to write the risk. The question here is what would have been said in the hypothetical situation in which a fair, as opposed to an unfair, presentation is made. In this context, it cannot be relevant that the broker could have said something if in fact he would not have done so. It does not seem to me that there should be any presumption that the broker would have said everything good about the risk that could be said but the court may need little persuading that a competent broker would have endeavoured to say as many good things about it as were open to him.

60. The third is that it may well be necessary for the court to determine what considerations played, and, in the event of a hypothetical fair presentation, would have played, a part in the mind of the person to whom the risk was/would have been presented, since what mattered to him would be likely to determine or influence how he would have responded to any presentation. Here again the court is concerned with the subjective position of the presentee. The fact that he could have been interested in something is irrelevant if in fact he would not have been. The court will also obviously have to take account of what the presentee already knew and had in his mind anyway.

61. In the event I do not think that there is anything in this first ground. People, including judges, do not always speak with the precision in the use of modal verbs to which the submissions on this point have been directed, particularly when what is under consideration is a hypothetical situation. After the judge handed down his judgment in draft the fact that he had used "could" in a couple of places as opposed to "would", in circumstances where, in one place – paragraph 176 - he had made a distinction between them ("*could (and would*")– was drawn to his attention. About that he said this:

> *"1. I am going to refuse permission to appeal. So far as the first proposed ground is concerned, it is submitted that I wrongly based my assessment on what could have happened if the material loss statistics for 1989 to 1995 had been disclosed, not on what I concluded would have happened, which is said to be the correct test. It is perhaps not for me to try and construe my judgment, but my reading of the critical paragraphs at any rate, for what it is worth, is that I was indeed applying the test of what would have happened. I draw together my conclusions on inducement at paragraphs 171 to 179 and in paragraph 176 I introduce the fifth consideration by saying that NMB could and would fairly have explained et cetera.*
>
> *2. I would read the succeeding paragraphs as dealing with the matter on the same basis. That was certainly my intention. So that what I concluded was applying the test which Mr Holmes wishes to submit is the correct test. Accordingly, if AXA wants*

> *to pursue that, it must do so by seeking permission from the Court of Appeal."*

62. In my view the judge was entitled to clarify his intended meaning even though he did so after the order had been drawn up. We were referred to *Space Airconditioning plc v Gray* [2012] EWCA Civ 1664 and *In re L* [2013] UKSC 8 which show that there is power to correct a judgment and, indeed, in the latter case, to reach a different decision, before an order is drawn up. The basic principle is that the judgment should be an accurate record of what the judge intended to decide. An order, once made, cannot be altered unless there is some statutory power to do so. But here the order sealed on 7 July 2015 required no alteration. In my view, we should proceed on the basis that the judge was throughout referring to what would have happened and not, in the "could" passages, to what could have happened but which had not been shown would probably have happened.

Ground 2

Axa's submissions

63. Axa does not seek to appeal the primary facts found by the judge, as opposed to the inferences to be drawn from them. Its second ground of appeal is that there was no proper basis for the judge's hypothetical broke and that the judge's findings on inducement (that Mr Holzapfel would still have written the business following a fair presentation) was erroneous, whether the hypothetical broke is taken to be the one suggested by the judge to Mr Holzapfel in evidence or the one contained in his judgment i.e. including the voluntary particulars table.

64. In addition, Axa contends that the judge's finding is a product of procedural unfairness. The hypothetical broke put by the judge to Mr Holzapfel when he was giving evidence was not pleaded; nor was it supported by evidence from the brokers that that is what they would have presented to him. It was also not part of Arig's case. And when it came to the judgment various factors were introduced into the hypothetical broke as to what could or would have been said that had not been put to Mr Holzapfel nor been the subject of evidence by the brokers. In addition, the loss statistics suggested to him in evidence were not the same as those that the judge found should have been disclosed. As a result, Axa and Mr Holzapfel were deprived of the chance of dealing with, and responding to, a broke which only appeared in the judgment. This was unfair. Further the judge seems to have rejected his evidence in response to the hypothetical broke put to him by the judge without having cast any doubt on the answer when he gave it. Most importantly of all the judge's conclusion cannot stand with important unchallenged evidence of Mr Holzapfel to which I shall refer.

65. Axa's case was that the hypothetical broke should have included the statistics in the voluntary particulars. But the broke referred to in paragraph 163 of the judgment was based on the Swire Fraser statistics above and there are significant differences between the two: see [14] above. Further no one except the judge suggested that it was the Swire Fraser statistics that should have been presented.

66. Further the hypothetical broke at [163] included saying that:

> *"there had been a change of underwriter at Arig and the new underwriter was adopting a more rigorous and selective approach to the risks which he was prepared to accept, so that quite a number of the risks which the previous underwriter had been prepared to accept would probably not have been accepted under the new approach".*

67. That Arig could honestly have said this is difficult to square with the judge's findings in paragraphs 94 - 101. In those paragraphs he held that the change of strategy was less clear cut than Arig suggested [98]; that the position was more nuanced than Mr Hylander's witness statement suggested [99]; that during his tenure Arig had continued to write business with low deductibles and from time to time to write risks with each of the characteristics which he would have preferred to avoid albeit not necessarily on the same scale as before [99]; and that a memorandum written by Mr Hylander in January 1995, which was intended to form part of the placing documents for the renewal of the energy quota share and which said that Arig had "*adopted a slightly different underwriting policy in 1993*" was a fair summary, although by 1996 Arig was once more seeking to increase its book of construction risks as the premiums available for operational risks were becoming more competitive [101] i.e. was writing riskier risks. He concluded that there was genuine change in direction "*but that it was the kind of intangible and gradual change which although real would have been difficult to demonstrate in any quantifiable way as part of any broking exercise*" [111].

68. In addition, as the judge noted at [42] in relation to the information provided by Arig to Swire Fraser:

> *"the positive points made by Arig with a view to persuading prospective reinsurers that these historic results did not reflect the outcome which might be expected on the new risks for which Arig was seeking reinsurance had nothing to do with the fact that there was a new underwriter now in place and that a radically different underwriting strategy was now being followed. Instead Arig focused on the higher deductibles and higher premiums which it suggested could be achieved in 1995 market conditions".*

That was a reference to Mr Bader's as ifs.

69. Further, as the judge found, Mr Bader and Mr Stow did not, when considering the broke for the first treaty, discuss the change of underwriting policy as something to be presented to putative reinsurers [55]. Mr Hylander's memorandum of 7 July 1996

which the judge set out in [55] - [56] revealed certain important matters to which the judge drew attention in [60] – [65]. It showed that Arig expected a poor loss development on the risks which it had already written and expected to write in 1996, because it had been and would be unable to achieve deductibles as high as it wished. The reinsurance sought would give Arig *"a good chance of making an overall profit"* which without the benefit of such reinsurance it was much less likely to achieve, [61]. Second, the memorandum referred to Arig's knowledge based on its own experience that energy construction business was highly exposed. [62]. Third, that loss experience was regarded by Mr Hylander as highly relevant to the decision to seek first loss protection [63]. Fourth, and most significantly, there was no suggestion by Mr Hylander that Arig's past experience was irrelevant because a different underwriting strategy was being pursued. [64], Fifth the memorandum recognised that it would be very difficult to obtain the first loss protection which Arig sought [65].

70. In those circumstances, it was not likely that the hypothetical broke would have contained reference to the change of underwriting strategy. Nor was there any, or any sufficient, evidence that, in addition to the 1989 – 1995 statistics, which should have been revealed, Arig would have presented the risk to Albingia in the terms suggested or relied on the considerations that the judge took into account.

71. As to inducement the judge placed some reliance on the fact that Albingia had entered into a quota share treaty with Arig. However, under that form of treaty there was a sharing of risk, which there is not under a first loss treaty. Further the statistics presented in respect of underwriting years 1990 to 1995 showed loss ratios of less than 100%: see [18] above. And these ratios were reached after including two large losses to most of which the first loss treaty would not respond. Further 74.5% of the risks were said to be operating risks. That Mr Holzapfel was prepared to write that business does not tell one much about his preparedness to write first loss business on construction risks with the loss statistics with which he should have been presented.

72. The judge also referred to four first loss treaties which Arig entered into between late 1995 and the first treaty. They are (a) the AIG Oil Treaty [48]; (b) the Copping syndicate [49]; (c) the Atkin syndicate [50]; and (d) a further treaty with AIG [51]. Here the relevant loss ratios were markedly different to those of Arig.

73. In respect of treaty (a) the loss ratio for 1991, the most mature year, was only 33.2%. In respect of treaty (b) both the 1991 and 1992 years had been loss making, but this was explained as the consequence of two substantial losses in 1991 and one in 1992. If those losses were taken out of the reckoning insofar as they exceeded the first loss limit, the loss ratios on both years was around 30%. In relation to treaty (c) the brokers worked out the "as if" to the treaty terms and the loss ratio was an average of 2%. In relation to treaty (d), as the judge records, no historic loss statistics were provided but the risk was presented by NMB on the basis that Albingia already had a very good relationship with AIG and that the proposed treaty was very similar to the AIG oil treaty. The judge found that Mr Holzapfel took a 20% line subject to suitable excess of loss reinsurance probably because of the existing relationship with AIG. None of these statistics were anything like those from Arig.

Procedural unfairness

Particulars of Claim

74. In relation to the claim of procedural unfairness it is necessary to consider some of the history. In the original Particulars of Claim Axa had pleaded that Arig had failed to disclose material loss statistics and that, if it had done so, Mr Holzapfel would have declined the first treaty; and that, in the alternative, he would have asked for "as ifs" applying those loss statistics to the proposed treaty, and, having seen them, would then have declined the risk. I call these the "as if to the treaty" statistics.

75. The loss statistics were those in the voluntary particulars table. The as if to the treaty statistics were before the court. These were the 1989 to 1995 loss statistics (i.e., the premium and losses in relation to the years 1989 to 1995 as at the end of 1995) and the 1989 to 1996 loss statistics (i.e. the premium and losses in relation to the years 1989 to 1996 as at the end of 1996) if, in each case, the premiums and losses were those which would apply under the terms of the 1996 and 1997 treaties.

76. The 1995 figures are as follows:

Table 3 – the 1995 As If Calculations (i.e. the 1995 Loss Statistics applied to the 1996 Treaty on as "as if" basis)

Year	Premium to FLT	Losses incurred to the FLT	Loss ratio
1989	US$706,014	US$5,113,499	**724%**
1990	US$978,955	US$6,014,347	**614%**
1991	US$850,136	US$3,354,177	**395%**
1992	US$566,416	US$1,353,153	**239%**
1993	US$554,509	US$235,311	42%
1994	US$36,453	US$0	0%
1995	US$32,804	US$0	0%

I refer to this as "Table 3".

77. In paragraphs 189 and 190 of his first witness statement Mr Holzapfel said:

> *"189. Had ARIG's relevant historic loss record as at 31 December 1995 been included in the NMB offer fax 17 July 1996 then I would probably have instructed Ms Jerabek to decline the offer. The only other possibility is that I would have instructed Ms Jerabek to request further information from NMB, including relevant "as if" calculations specific to the proposed treaty, to see how the limits and premium amounts associated with the 1996 First Loss Treaty as proposed, affected the performance of the construction account. These "as-ifs" would include the application of the proposed premium scale to the historical account, taking account of any*

> *deductions to premium under the First Loss Treaty, and limiting the individual losses to the US $500,000 proposed treaty limit.*
>
> *190. Upon receipt of such "as-if" calculations (as set out in the table at 25A of AXA's Re-Re-Re-Amended Particulars of Claim), I would certainly have instructed Ms Jerabek to decline the 1996 First Loss Treaty or, if such figures were not provided until after my return to the office on 29 July 1996, I would have declined the offer myself."*

Defence

78. Arig's first line of defence was that the hypothetical prudent underwriter would not have regarded any loss statistics as being material to the writing of the 1996 treaty: paragraph 27d of the Defence. In relation to the change in underwriting strategy it was not until its Re-Re-Amended Defence and Counterclaim in March 2015 (paragraph 27 e) that Arig pleaded that Mr Hylander had adopted a change in underwriting strategy, even though Mr Hylander and Mr Bader had been contacted by Arig and questioned in relation to these proceedings from the start. That averment formed part of the claim that there was no breach of the duty of disclosure because, in the light of the change of policy, there was nothing material to disclose.

79. As to inducement Axa was simply put to proof. No positive case was pleaded - in the alternative to a denial of any failure to disclose material information - as to what else a fair presentation would have included if the 1989 onwards loss statistics had been disclosed, or what else Arig/NMB would have said if they had been included. Mr Charles Kimmins QC, for Axa, submitted that, if it had been pleaded that a fair presentation would have included or been accompanied by a statement as to what the change of strategy amounted to, Axa might well have turned round and said that what it was claimed would have been said would, itself, have been a misrepresentation (either as to the past or as to Mr Hylander's intentions for the future); and would, in any event, have wished to investigate and seek discovery in respect of the change and to consider what evidence there was of it.

80. As to the evidence Mr Stow said in paragraph 9 of his second witness statement

> *"9. I do not think that an underwriter of Thomas Holzapfel's experience would have accepted the absence of loss statistics without a satisfactory explanation. He could, if he wished to,* ***have requested statistics in respect of Arig's energy portfolio, notwithstanding that they would not have reflected Arig's underwriting philosophy going forward. If he had, we would have requested the historical statistics from Arig. However, I expect that Arig would have explained that the statistics related to risks accepted before Mr. Hylander took over as underwriter and changed Arig's underwriting philosophy.***

> ***Arig would probably also have produced 'as-if' statistics showing the results of the construction portfolio 'as-if' the new underwriting philosophy had been in place during prior years****. Of course, Thomas Holzapfel or any other reinsurers could have declined the risk if there were not satisfied with the placing information."*

81. That passage, which went to whether Albingia had waived any entitlement to see loss statistics, does not say anything about what Mr Stow, himself, would have done. Nor does it say that in the hypothetical broke he would have made some play of the fact (a) that the quota share was oversubscribed, amounting to a vote of confidence in Arig by the market; (b) that he would have emphasized that Mr Hylander had adopted an approach to energy risks which would have satisfied Mr Holzapfel; (c) that he would have emphasized that Albingia would receive some immediate cash flow; or (d) that he would have sought to explain away the 1989-1990 figures on the basis that the market in general had suffered adverse market conditions – although these are matters that the judge found would or could have been said in the hypothetical broke. Nor does one gain much from an expression of view on his part as to what Arig would have done.

82. In paragraph 28 of his first statement Mr Hylander said:

> *"28. Since NMB had provided Albingia with the information that would be needed to decide whether to underwrite the 1996 Treaty I would have been surprised if it had also asked for historical loss statistics - Albingia already knew how many risks to expect, how much premium to expect and how many risks there would be.* ***Had it done so, however, I would have provided them together with a clear warning that they were not reflective of my underwriting intentions going forward, which accorded with the information contained in the slip"***

83. That passage, which appears again to be directed to the question of waiver, is, Mr Kimmins submits, the meagre extent of Mr Hylander's evidence on what he might have said and does not cover the various points that the judge found in his hypothetical broke.

Cross examination of Mr Holzapfel by counsel for Arig

84. When Mr Holzapfel was cross examined Counsel for Arig did not put any statistics from 1989 to 1995 (as opposed to 1991 to 1995) to him. (We were told that by the time of the trial Arig did not have the information necessary to carry out an as if exercise in relation to 1989 and 1990 statistics). What was put to him was the Arig reconstruction as ifs with figures for "*only risks of a type that would be ceded to the FLT"*. This was the exercise that the judge characterised as of little value. The figures put to Mr Holzapfel contained a claims size and frequency analysis. It was in relation

to these figures that Arig secured the favourable answer to which the judge referred in [152] of his judgment: see [43] above.

Re-examination of Mr Holzapfel by counsel for Axa

85. When it came to re-examination there occurred this exchange:

> **Counsel for AXA**
>
> *"Q. I see. Could you go to {L1/13/182}? [*This was one of the versions of the Arig reconstruction "as ifs" in relation to 1991-5 put to Mr H.] *You were asked a number of questions about the loss ratios which appear here. I want to ask you a hypothetical question: assume that you were aware that there were in fact loss statistics for 1989 and 1990 which were in existence --*
>
> *MR BRYAN: My Lord, we didn't ask any questions in cross-examination about 1989 and 1990, so it's not appropriate to examine those years, it's a matter that should have been in his witness statement if he can deal with 1989 and 1990.*
>
> ……
>
> *MR JUSTICE MALES: Just a moment. Do you accept that you haven't challenged paragraph 193[2] of Mr Holzapfel's witness statement? {B1/1/29}*
>
> *MR BRYAN: My Lord, we would have to look that up.*
>
> *MR JUSTICE MALES: If you don't accept that, then I will allow the question.*
>
> *MR BRYAN: My Lord, the question was asked in relation to 1989 and 1990, not 1991.*
>
> *MR JUSTICE MALES: Yes, I know.*
>
> *MR KIMMINS: It's entirely fair when --*
>
> *MR JUSTICE MALES: I will allow the question.*
>
> ***MR KIMMINS: Thank you, My Lord.***
>
> *Assume you had been told that there were in existence loss records for 1989 and 1990, would you have asked to see them?*

[2] In this paragraph, Mr Holzapfel said that it would not have made any difference to him if he had been told that there was a change of underwriter and a new type of book, and that it would not have made any difference to his request for loss information or his analysis of the very poor statistics.

A. Yes, of course.

Q. Why?

A. Because I wanted to see the performance, how the company managed the business over a longer period of time.

Q. I see.

A. And I think it's their duty to disclose whatever they have in terms of loss history.

Q. I see. The figures that we are looking at, could we go back to {L1/13/182}, are the figures on ARIG's inwards book, that is the position. Now I want to take you to one paragraph in your witness statement, please, which is {B1/1/28}, and I want to ask you about -- hold on, let me find the reference -- ***189:***

"Had ARIG's relevant historic loss [history] as at 31 December been included in the NMB fax… I would probably have asked Ms Jerabek to decline the offer. The only other possibility is that I would have instructed Ms Jerabek to request further information from NMB including relevant 'as-if' calculations specific to the proposed treaty, to see how the limits and premium amounts associated with the 1996 first loss treaty as proposed, affected the performance of the construction account. These 'as-ifs' would include the application of the proposed premium scale to the historical account, taking into account deductions…"

If we could have up on the screen, please. {A1/9/111}. Now, Mr Holzapfel, is this a document you have seen before?

This is Table 3

A. I do not recall.

Q. These are as-if calculations using the ARIG inwards book loss data and applying it to the treaty.

A. Mm. They are widely different from what Mr Hylander has calculated.

Q. Now, what I want to ask you is this: the documents you were shown were on ARIG's inward book, and let's look at 91 to 95, which is what appeared in the document you were shown, 91 to 95 on the document in the L bundle that we looked at, one saw certain percentages. If one looks at the as-if percentages for 91 and following, you can see they are 395, 239, 42, 0 and 0.

> ***MR BRYAN: My Lord, none of these as-ifs were put into cross-examination.***
>
> ***MR JUSTICES MALES: No, they weren't.***
>
> *MR KIMMINS: My Lord, the difficulty is this: what my learned friend did is cherry-pick a scenario of being shown 91 onwards. Now, I ought to be entitled to say to my witness "okay, fine, if you are going to be cross-examined on the position, were you shown 91 to 95 only, what would your reaction have been if you looked at those on an as-if basis?" I have to be able to put that in circumstances where it was only in cross-examination that my learned friend put the 91 to 95 figures in isolation to Mr Holzapfel.*
>
> *MR JUSTICES MALES: Well, I don't think this does arise out of cross-examination. It's simply not a point that Mr Blackwood went to, and you are left, therefore,* ***with the submissions that you can make based on paragraph 189.****"*

86. So, Mr Kimmins was making the point that Mr Holzapfel had not been cross examined by reference to the 1991 to 1995 figures on an as if to the treaty basis (as, indeed, he had not). And, on that basis, he was not allowed to re-examine on the 1989 – 1995 statistics.

The judge's questions

87. At the very end of his evidence the judge asked Mr Holzapfel a series of questions in which he put forward what Mr Kimmins characterised as hypothetical broke mark 1. It is, in effect, summarised in paragraph [163] of the judgment. For ease of reference the questioning is set out in an appendix to this judgment. The loss records that it was suggested (hypothetically) would be shown to Mr Holzapfel are the Swire Fraser documents. They are D1/4/23 in the trial bundle which is the document which produces the figures in the table at [12] and D 1/4/27 which is a year-by-year breakdown of the figures for premiums and losses attributable to underwriting years 1989 – 1993. They are the two documents referred to in [13] above.

88. As I have already observed these figures differ from those in the voluntary particulars table in that they did not include the numbers of risks or the number of claims both of which, particularly the latter, are material. In addition, it is to be noted that the Swire Fraser figures came with Loss Ratios which showed for 1989 to 1993 the ratio of losses up to $ 5 million to net premiums. This produced the following ratios:

1989	122.65%;	[424%]
1990	190.45%;	[225%]
1991	94.57%;	[109%]
1992	77.89%	[65%]
1993	12.51%.	[12%]

As I have said, these ratios relate to a treaty which was to respond to losses up to the first $ 5 million, unlike the first treaty which would respond to losses up to $ 500,000; and the loss ratios in respect of the latter were worse than in relation to the former. The figures from the voluntary particulars table are in the final column.

Axa's expert

89. Mr Hartigan, Axa's expert, was cross examined by reference to the 1991 – 1995 figures, and not the 1989-1995 ones. Even then he indicated that he would want to make sure that the risks of a type that supposedly would not be on the treaty would not in fact be ceded by requiring a list of exclusions. Mr Simon Bryan QC, Counsel for Arig made plain that, so far as he was concerned, what was being put did not include the 1989 and 1990 statistics.

Submissions

90. In its closing submissions Arig invited the court to find that, if NMB had presented loss statistics to Albingia in July 1996, that would have involved production of loss ratios which were the same or similar to those in the 1991 – 1995 statistics shown to Mr Holzapfel in cross examination, and not the Swire Fraser statistics. The submissions also referred to the five-point question on inducement asked by the judge and said that "*this hypothetical question is not in point*" because the questions were put by reference to statistics which assumed a treaty limit of $ 5 million and assumed that the 1989 and 1990 statistics were relevant when they were not. No suggestion was made that what Mr Holzapfel said in paragraphs 189 and 190 in relation to his reaction if the 1989 -1995 statistics had been presented to him was wrong.

91. In their closing submissions Axa pointed out that Mr Holzapfel's evidence in these paragraphs that he was "*induced by the* [non-disclosure of] *the 1995 Statistics including the 1989 and 1990 years' results was* ***never challenged****".*

92. As I have said, the judge indicated [152] that a fair presentation would have involved at least some "as if" statistics without indicating which ones those might be. The candidates include Arig's reconstruction "as ifs". Another candidate is table 3 which would seem unlikely. It is, also, in my view, not what the judge can have in mind, because it is not an exercise applying any change in underwriting strategy. A third is statistics with a higher premium or a lesser deductible such as Mr Bader's "as ifs". But examples of these were never put to Mr Holzapfel. On the whole it seems to me that the judge must have been contemplating some form of Arig reconstruction as ifs even though he thought these to be of very little value [106] and incapable of demonstrating in any concrete or quantifiable way what impact the new policy would have had on risks in place during the period from 1989 to 1992 [111].

Arig's submissions

93. In response to the submission that the constituents of the hypothetical broke and the considerations which informed the judge's conclusions at paragraphs 172 ff were unsupported by evidence Mr Bryan submitted to us that the matters in question were all dealt with in the evidence and he directed us to passages in it.

94. Thus, the fact that Arig had already entered into four first loss treaties was established, as was the existing relationship between Arig and Albingia in the quota share treaty, which the judge described as "*an obvious element of any broke*" and the oversubscription of which represented a vote of confidence in Arig by the market, of which, the judge said, NMB would have been able to make some play. The judge also found, in the light of his evidence, that Mr Holzapfel knew that energy underwriters were moving away from operational risks in favour of construction risks, even though the latter were a higher risk: [166]. He was entitled to find, as he did, that the existing relationship would have been an important factor if a fair presentation of the risk had been made.

95. Similarly, the judge was entitled to regard it as significant that Mr Holzapfel had not made any inquiry about deductibles, despite the position that he had taken in relation to the Copping treaty: see [53] above. Mr Kimmins submitted that this missed the point that, in view of the statement "*This is a new Treaty for the Reassured and as such does not have a corresponding loss record*", Mr Holzapfel had thought that there were no loss statistics to reveal, a position which the judge found understandable. But, as Mr Bryan pointed out, fifteen risks had already been written which were to be ceded to the first loss treaty and Mr Holzapfel could easily have inquired as to what the deductibles, if any, were on them or would be on future business. The judge was entitled to think that the fact that he did not was illustrative of how apparently categorical evidence given by Mr Holzapfel in good faith may be wrong. In addition the judge found it impossible to determine whether Mr Holzapfel in fact had that understanding at the time.

96. The judge was equally entitled to find that cash flow was a factor of some importance to Mr Holzapfel at the time, as is apparent from the contemporary documents which the judge saw, and which we have seen, and from passages in Mr Holzapfel's oral evidence. He was entitled to find that cash flow would not have been a major factor but would have been of some benefit. Mr Kimmins observed that the cash flow from the already written risks to be ceded to the treaty would only be $ 230,000, of which Albingia would only get $ 115,000. But every little helps, especially when there are excess of loss premiums to be paid.

Conclusions so far

97. In my view, it was open to the judge to treat the fact that Albingia had already written two first loss treaties, that Mr Holzapfel made no inquiry about deductibles, and that Albingia was interested in cash flow as relevant factors in determining whether Mr Holzapfel would have accepted the risk. Mr Holzapfel's response when the omission to ask about deductibles was pointed out to him was recorded in the judgment [168]:

> *"When asked about this apparently surprising omission, Mr Holzapfel said that he had to leave it to the ceding company to decide whether a risk was adequate in terms of pricing, conditions and deductibles. He added that with hindsight "it would have been nice" to have information about Arig's deductibles, but that "it was sort of a carte blanche to say, Yes,*

> *we want to support them" and was "a shot in the dark, insofar we had no, say, information about deductibles or whatever."*

That is evidence that, in relation to Arig, he was indeed prepared to take a shot in the dark in order to support his quota share partner.

98. That there would be some immediate cash flow from premiums on the treaties already written which were to be ceded to the first loss treaty was obvious. The judge found that NMB would have been able to point to the cash advantage. There is no evidence from Mr Stow of which I am aware in which he said that he would have done so but the judge was, it seems to me, entitled to infer that that is what Mr Stow is likely to have done; and, in any event, the benefit to cash flow was evident.

99. In relation to the seven matters set out in paragraphs [172] to [178] of the judgment - see [55] above - the first is a conclusion, which, in the light of his non-acceptance of Mr Holzapfel's evidence about findings about deductibles and cash flow the judge was entitled to reach, about the safety of reliance on Mr Holzapfel's assertion about what he would/would not have written in the various scenarios "*about which he was asked*".

100. The second observation is based on the absence of any information about deductibles, which I have addressed above.

101. The third point is the significance to be derived from the fact that Mr Holzapfel wrote a 20% quota share of Arig. On the documentary and oral evidence before him the judge was, in my view, entitled to conclude that Mr Holzapfel regarded Arig as a high quality reinsured, that he wrote a quota share for that reason and that the fact that he did so was significant in determining whether he would have subscribed to the first treaty following a fair presentation. The effect of the quota share treaty was that Albingia was already sharing the fortunes of Arig which would extend to any construction risks it wrote. In addition, Mr Holzapfel indicated in his oral evidence that if Albingia supported Arig in the quota share treaty which was predominantly on production risks business it might just as well follow them on the construction business, i.e. the first loss treaty, just as it did with AIG on a much larger scale. A similar combination of quota share and first loss occurred with the Copping syndicate.

102. The fourth is a finding as to Mr Holzapfel's fair mindedness such that he would have been willing to consider on its merits any explanation given to him of poor loss records. A finding of fair mindedness is not something of which Mr Holzapfel can complain and his willingness to consider any explanation given to him of its loss records was apparent from his evidence.

103. The fifth point is that NMB would have explained that the poor results achieved by Arig were on risks written for the most part by a former underwriter and that Mr Hylander had adopted a more rigorous and selective approach to energy risks in general which had satisfied Mr Holzapfel for the purpose of writing the quota share. Axa submits that this finding was not open to the judge. There was no reference to a change of strategy in the Swire Fraser broke; nor in Mr Hylander's memo of 7 July

1996 in which he said that Arig would find it difficult to get cover. Mr Bader and Mr Stow did not discuss it when NMB tried to get cover either for the quota share or the first loss treaty; or, on the judge's finding the change was only *"slightly different*".

104. However, the judge had found in [111] that Mr Hylander had "sought to introduce a more rigorous and conservative underwriting policy than his predecessor and that he was successful in doing so" even though that it was not demonstrable in any concrete or quantifiable way what impact that policy would have had during the period from 1989 to 1992. In the light of that finding it seems to me that the judge was entitled to find that, if the first treaty fell to be broked with the 1989 statistics the likelihood was that reference would be made to the change of policy. The judge's formulation of what would have been said ("Mr Hylander has adopted a more stringent and selective approach… so that quite a number of the risks which the previous underwriter had been prepared to accept would probably not have been accepted under the new approach") must have represented the judge's assessment of the appropriate limit of what could properly be said in the light of what change he found had come about.

105. I do not regard the judge as disabled from reaching a conclusion as to what would be a fair presentation (an objective question) by the absence of direct evidence from the broker about what he would have said or disabled from inferring what the broker would have said (in hypothetical circumstances) in the absence of such evidence. An inference can be drawn from surrounding circumstances. Further, evidence of what the broker did not say when making an unfair presentation is not necessarily a reliable guide to what he would have said or added when making a fair one. Limited though his evidence was, Mr Hylander's statement was to the effect that if figures had been asked for they would have been given but he would have provided Axa with "*a clear warning that they were not reflective of my underwriting intentions going forward, which accorded with the information contained in the slip"*: see [83] above. In those circumstances the judge was entitled to find that, if loss statistics had been provided they would have been accompanied by a reference to the change of underwriting policy. That evidence was given in relation to whether Arig should have given historic loss statistics but it can be relied on as covering the situation where (in the hypothetical broke) they are in fact provided. The same goes for the evidence of Mr Stow to the effect that, if Mr Holzapfel had requested historical statistics, he would expect Arig to have explained that they related to risks accepted before the change of underwriting philosophy and that Arig would probably have produced as if statistics showing the results of the construction portfolio as if the new underwriting philosophy had been in place during prior years. Mr Stow confirmed to the judge that he himself had performed such an exercise in relation to other brokes.

106. The sixth point was that the particularly bad results achieved in the 1989 and 1990 years reflected adverse market conditions not comparable to the situation as it was believed to be in 1996.

107. As to the adverse conditions in the market in 1989 and 1990 there was no direct evidence from the brokers that they were aware of the fact that the condition of the market was very different in those years, or that they would have made that point in any broke or that Mr Holzapfel was aware of market conditions in those years. But 1989 and 1990 undoubtedly had adverse market conditions in the energy market and it was legitimate for the judge to infer that the contrast between those years and 1996

would have been drawn. Mr Outhwaite's evidence was that he doubted that any underwriter was not hit by losses in 1989 and 1990.

108. The seventh point was that, although first loss reinsurance on energy construction risks was a particularly hazardous type of risk, Mr Holzapfel was not averse to running these risks. The fact that he had done so was proved in evidence and was a relevant factor.

109. For all those reasons the judge was left in doubt as to what Mr Holzapfel would have done if there had been a different presentation and such explanatory points as could have been made.

110. In the light of the material to which I have referred above, I accept that, subject to the point to which I am about to come, it was open to the judge to be left in the state of doubt in which he ended up, having regard to the factors to which he referred.

Procedural error

111. There remains, however, for consideration the question of procedural error.

112. In summary, Axa submits, the position stands thus. Axa pleaded in clear terms that the 1989 – 1995 loss statistics as set out in the voluntary particulars table should have been disclosed. The judge agreed [158]. Axa also pleaded that, if those statistics had been disclosed, Mr Holzapfel would have declined the risk, either when those statistics were disclosed or after he had been provided with the "as if" calculations specific to the proposed treaty. Mr Holzapfel, whom the judge found to be an honest man, gave evidence to that effect [189] – [190]. He was not cross examined by counsel for Arig by reference to the 1989 – 1995 figures and counsel for Arig did not challenge what he there said. The judge declined to allow any re-examination by defence in relation to "as if to the treaty" statistics for 1991-1995. The judge then put hypothetical broke mark 1, which is not the same as the voluntary table. His questions met with the clear response that Mr Holzapfel would have declined the risk. He was not questioned or challenged as to his answer; nor was it suggested to him that what he said was difficult to understand or wrong or misguided. In Arig's final submissions, it was not suggested that what Mr Holzapfel said about his response to the 1989 – 1995 statistics was wrong; but that the judge's five stage questioning was "*not to the point*".

113. Nevertheless, the judge said he was left in doubt as to what Mr Holzapfel would have done if a fair presentation had been made to him.

114. The sequence of events set out in the previous paragraph amounts, Axa submits, to a serious irregularity. Axa succeeded in establishing that the 1989 – 1995 statistics should have been disclosed but failed on the question of inducement in circumstances where Arig did not challenge Mr Holzapfel when he gave his evidence as to what would have happened if <u>those</u> statistics had been disclosed. That evidence was not particularly surprising given the latter figures showed large loss ratios for 1992 even after Mr Hylander was in charge. The table below compares the loss ratios in the voluntary particulars table with table 3:

Year	Voluntary Particulars Table	Table 3
1989	424%	724%
1990	225%	614%
1991	109%	395%
1992	65%	239%
1993	12%	42%
1994	0%	0%
1995	0%	0%

115. What the judge said was this:

> *"160 In his first witness statement Mr Holzapfel said that if Arig's historic loss record as at 31 December 1995 had been included in the NMB offer fax of 17 July 1996, he would probably have instructed Ms Jerabek to decline the offer. That evidence is not difficult to accept in isolation, but it assumes that the figures were presented without explanation, which is not the relevant scenario. However, his witness statement went on to say that if Arig had told him that it had changed underwriter in 1991 and that the new underwriter wrote a different kind of book, this would not have made any difference: he would still have declined the treaty irrespective of this explanation. In his second statement Mr Holzapfel insisted that such an explanation would not have affected his usual approach to assessing risk, which "always involved a careful assessment, based on the documents presented to me by the broker, of the profitability of the account over time". This, however, was an over statement. While I accept that examination of loss statistics was Mr Holzapfel's usual practice, it was not invariably so. There is at least one case in evidence where he did not do so, which was a case where Albingia already had an existing relationship with the reinsured (AIG: see [51] above)."*

116. But the judge did not refer to Mr Holzapfel's evidence that had he not told Ms Jerabek to decline the risk immediately, the only other possibility was that he would have asked for the as if to the first treaty figures and, having received them, would certainly have refused the risk. The figures in Table 3, which would appear to show something significantly wrong even in 1992, a year with more development to come, were neither referred to nor addressed.

117. Mr Bryan submitted that this point is misplaced. It is necessary to look at what Mr Holzapfel said when cross examined because it is apparent that what he said orally was not consistent with what he was saying in his written statement. He was asked what would be the position if it had been explained to him that there had been a change of underwriter and in underwriting philosophy and a simplified version of the Arig as if reconstruction figures had been produced; and it was suggested that he would have written the first treaty in the same terms. To that he replied:

> *"No. I don't think so. Preparing statistics with the benefit of hindsight is not acceptable. I want to see* ***the full picture*** *and then we can go into details, but show the full picture first, please.* ***Put facts on the table*** *and then we can say what are they doing to implement, how are they going to do this,* ***do another as if exercise and whatever*** *but not on the basis of as if."*

118. A little after that he was asked to assume that he was shown a table which showed the actual loss ratios for 1991 onwards of 109%, 65% and 12% (i.e. as in the voluntary particulars table), received an explanation of the change of underwriting strategy, and was told of the difference between those loss ratios and the lower ones produced by the as if calculations. On those assumptions, he was asked whether he would have written the business and he said that he would.

119. It is not wholly clear to me to exactly what "full picture"/"facts on the table" Mr Holzapfel was referring in the answer that I have quoted in [117] above. In particular it is not clear whether he was referring to as if to the treaty statistics: but, if he was, his subsequent acceptance that he would have written the treaty given the explanation for the change of underwriting philosophy would indicate that he would not have declined the risk on account of the absence of such statistics.

Conclusion

120. Axa's case on procedural error was forcefully and attractively presented by Mr Kimmins. But I am not persuaded that it should carry the day. The judge was plainly aware of paragraphs 189 and 190 of Mr Holzapfel's statement. He referred to paragraph 189 specifically when he cut short Mr Kimmins' re-examination and, as appears from what he said, expected submissions to be made on the basis of it (as they were). It is that paragraph to which he refers at [160] of his judgment: see [115] above. Whilst he does not refer to the possibility [sic] of Mr Holzapfel asking for as if to the treaty figures one of the prime bases of his decision was that categorical statements by Mr Holzapfel as to whether or not he would have written the risk in the various scenarios about which he was asked could not safely be relied on [172].

121. This was apparent from the fact that, although Mr Holzapfel said that his approach to assessing risk "*always involved a careful assessment based on the documents presented to me by the broker of the profitability of the account over time*", this, the judge found, was an overstatement and was not his invariable practice: [160]. It was also apparent from the contrast between what he said about the critical importance of deductibles in relation to avoidance of the Copping treaty and his absence of inquiry of Arig about deductibles on its risks that "*apparently categorical evidence given in good faith may be, if not dangerously wrong at least not the whole story*" and that was, as the judge found, something which could be equally true in relation to loss statistics [169]. Further Mr Holzapfel had said that cash flow was not an important factor whereas the contemporary documents showed that it was, as the judge put it [170], "*indeed a factor of some importance*".

122. It was in that context that the judge approached the question of what Mr Holzapfel would have done with the hypothetical broke. He first considered Mr Holzapfel's evidence that, if in addition to being given the actual figures going back to 1991 he had been told that Mr Hylander had taken over in 1991, and that he had applied a new strategy which if applied to the 1991 and 1992 years would have produced loss ratios below 30%, he would probably have written the risk on the same terms [162].

123. The significance of Mr Holzapfel's answer was that he would have been influenced by an explanation of the change of policy such that he probably would have written the risk on the same terms, *despite what he had originally said* in his witness statement which was that he would still have declined a treaty irrespective of any explanation about the change of underwriter and underwriting policy.

124. It was in the light of that that the judge addressed the question of what would have happened if Mr Holzapfel had been shown the 1989-1995 figures and had received the explanation of the change of underwriter to which he referred at [163]. Given:

(i) that the judge had found Mr Holzapfel's categorical statements about whether or not he would have written the risk were not reliable [169] and [172];

(ii) that Mr Holzapfel had said in relation to the 1991 – 1995 statistics that, with the suggested explanation of the change of underwriter and underwriting policy, he would have written the risk on the same terms; and

(iii) that the 1989 and 1990 figures were in the judge's view, only "*on balance*" necessary to be disclosed;

it seems to me that it was open to the judge (a) to have, as he put it, "*real doubt*" as to what Mr Holzapfel would have done if presented with loss records going back to 1989 together with the explanatory points that Arig or NMB would fairly have made; and (b) not to be persuaded that it had been shown to be more likely than not that he would have refused to write the treaty or would only have done so on different terms.

125. I do not regard the judge as having been precluded from reaching that conclusion by the way in which Arig conducted its case. Arig did not run a case based on the statistics from 1989. That meant that there was no cross examination from its counsel as to what would have happened if the 1989-1995 figures had been produced. Here such "cross examination" as there was came from the judge and involved no reference to the possibility of as if to the treaty statistics or consideration of Table 3.

126. However, in circumstances where:

(a) the onus of proof lay on Axa;

(b) the question was what Mr Holzapfel would have done in hypothetical circumstances 20 years earlier when he had no recollection of the actual broke;

(c) the judge had found unqualified statements of Mr Holzapfel not safe to rely on [172];

(d) Mr Holzapfel had agreed that if shown the 1991-1995 statistics he would have written the treaty on the same terms in the light of the explanation of underwriting strategy; and

(e) there were a number of considerations which indicated why he would want to write the risk - lack of inquiry about deductibles [168-9] and [173], interest in cash flow [170], keenness to support Arig [174]; different market conditions in 1988-9 [177] , previous writing of first loss risks including for a syndicate with a history of losses for 1991 and 1992 [177];

the judge was not, in my view, bound to accept that revelation of the 1989 and 1990 statistics would have made all the difference or to accept paragraphs 189 and 190 of Mr Holzapfel's statement at face value. He did not refer to the possibility of Mr Holzapfel asking for "as if" to the treaty statistics. But that is not entirely surprising. His doubt arose in relation to an earlier stage, namely whether Mr Holzapfel would have examined and made a careful assessment of the loss statistics [160] [172].

127. Mr Holzapfel's written evidence had been that, presented with the loss statistics for 1989 onwards, he would probably have instructed Ms Jerabek to decline the offer and that the only other possibility was that he would asked for as if to the treaty statistics and would then have declined the offer. Thus his primary position was that he would simply have declined the offer without more ado. It is noticeable, also, that, when the different scenarios were put to him by counsel and by the judge he did not refer, at any rate with any clarity, to the need for as if to the treaty statistics.

128. The judge plainly thought that there was a very real possibility that Mr Holzapfel would not have made a careful assessment of the statistics at all such that he was left in doubt as to what Mr Holzapfel would have done. He was, also, entitled to express a want of understanding as to why, if the statistics started with 1989 the position would have been the opposite of what it would have been if they started in 1991.

129. As the judge put it:

> *"Mr Holzapfel's answer was that he did not think that he would have entered into a relationship with Arig on the first loss treaty, because Arig had demonstrated that it was not able to manage the business properly over time. The scenario was that there had been a period of poor underwriting decisions with an underwriter following what turned out to be a bad policy, but that the situation had been managed by the introduction of a new underwriter who was successfully implementing a more rigorous approach"*

130. The judge cannot have meant that he did not understand what Mr Holzapfel was saying rather than that he was not persuaded that what he was saying was an accurate representation of what would have been his attitude to the hypothetical broke suggested to him. That his reaction would have been as he described was not without

foundation. Mr Holzafpel said repeatedly in his evidence that he would have looked to see how well the company was managed and he could well have been concerned about how Arig dealt with underwriting after Mr Simenstand fled Bahrain. But the judge's conclusion was, in my view, one that was open to him. He was entitled to think that the matter of principal significance to Mr Holzapfel would have been the change of underwriter/underwriting policy rather than the previous history, particularly when he found [155] that Mr Holzapfel knew or should have known that 1989 and 1990 had been disastrous years for the energy market generally. That tallied with the fact that Mr Holzapfel had said that he would have taken into account and been influenced by what he was told about the new underwriter and would have written the risk on the same terms if presented with the 1991-1995 statistics.

131. Nor am I persuaded that the procedure has gone so awry that we must set aside the judgment. The critical question is whether Axa have suffered such an injustice that we must set aside the decision. The procedural irregularity which is sought to be relied on is, in essence, twofold: (1) that the judge declined to allow Mr Kimmins' re-examination; and (2) that the judge did not accept paragraphs 189 and 190 when, in relation to the possibility of a request for as if to the treaty statistics, these were not formally challenged.

132. As to the former, I am not persuaded that the judge was not entitled to restrict the re-examination intended, which was based in part on leading the witness by reference to his evidence in chief in respect of a scenario on which he had not been cross examined.

133. As to the latter, the judge was concerned with events which had happened over 20 years ago, of which Mr Holzapfel had no recollection, and with what he would have done in hypothetical circumstances. I quite accept that if it is suggested that a witness is telling an untruth as to what he says did or did not happen, it is incumbent on counsel to put that to him and, if he does not, his client may find himself bound by the evidence which the witness has given. The position is not the same when the court is concerned with a parallel universe in which the question is what would have happened in hypothetical circumstances 20 years ago where the underwriter concerned has no recollection of the actual broke and where the onus of proof is on the reinsurer.

134. The judge gave Mr Holzapfel the opportunity to deal with his hypothetical broke and it was Mr Holzapfel's answers to the judge, when taken with all the other considerations to which the judge legitimately referred, that were of most significance in contributing to the judge's doubt. I do not regard the fact that Mr Holzapfel was not specifically challenged in relation to possible as if to the treaty statistics as justifying or requiring an allowance of the appeal or rendering that scepticism unwarranted or unfair. Nor do I regard the fact that what the judge referred to in his cross examination was the Swire Fraser statistics as invalidating his conclusion on account of the difference between them and the voluntary particulars table.

135. In short, I am not persuaded that, in deciding that the onus of proof had not been satisfied the judge was plainly wrong or reached a decision on no evidential basis or one to which he was not entitled to come. In the light of all the considerations to which he referred, it was open to him to be left in doubt. Such scepticism was not, in my view, unfair either to Mr Holzapfel or Axa.

136. For these reasons, I would dismiss the appeal.

Postscript

137. The facts of this case raise a question as to what needs to be pleaded or put in evidence, and by whom, in inducement cases. In the usual case the insurer will plead that there has been a material non-disclosure because some identified matter has not been disclosed; that he was induced to enter into the insurance on account of the non-disclosure; and that he has validly avoided it. The insured will not admit that the insured was induced to accept the risk by the non-disclosure.

138. It is for the insurer to prove inducement. That has to be determined by reference to what a fair presentation would require to be disclosed (which may be more than the inclusion of that fact the non-disclosure of which was complained of by the insurer) and is, in my view an objective question. In this hypothetical world, the question is what a reasonably prudent underwriter would think needed to be disclosed in order to give a fair presentation of the risk. In addition, there arises for consideration what additional matters the insured or his broker would have urged upon the insurer as reasons for writing the business. The dividing line between what a fair presentation required and what additional matters the broker would have urged may be difficult to determine and might be important since in determining the issue of inducement it is necessary to assume a fair presentation and ask what would have happened in the light of it, whereas in relation to additional matters which would have been raised by the brokers there would, as it seems to me, be at least an evidential burden on the insured to show that they would probably have been raised on the hypothetical broke. This conclusion seems to me consistent with the decision of this court in *Drake Insurance v Provident Insurance* [2002] EWCA Civ 1834. [62]; [74] [135].

139. What seems to me undesirable is that the insurer /reinsurer should be faced at trial, without prior notice either in a pleading or in any witness statement, of what the insured/reinsured, if wrong in contending that there was no non-disclosure, says, in the alternative, would have been the content of a fair presentation or would have been raised by the insured/reinsured or his brokers in any broke in which the matter which constituted the material non-disclosure relied on was in fact disclosed. If the matter is raised for the first time in cross examination ("If this statistic had been revealed and you had been told this, you would have written the risk, wouldn't you?)" it may provide a good example of cross examination as an art form. But it involves the insurer/reinsurer coming to trial without notice of the hypothetical factual case that he has to meet and being required to answer on the hoof a question which on a presentation in the real world would not require so instant a response.

Lord Justice Lewison

140. I agree.

Lady Justice Arden

141. I agree.

Appendix

The judge's questions at the end of Mr Holzapfel's evidence

"**MR JUSTICE MALES:** Right. I would like just to ask you one question, please, Mr Holzapfel. It's quite a long one. Various scenarios have been put to you in the course of your evidence as to what you would have done or wouldn't have done, if certain matters had been disclosed to you. I am going to put another scenario to you, and see if you can help. If you can't help, you must say so. Okay?

A. Okay.

MR JUSTICE MALES: It's got five points, so let me explain them to you, and make sure you understand it, and then see if you can answer or not.

Okay, point number 1 is that, when the risk is presented to you in 1996, nothing is said to you to the effect that ARIG has no loss records, so you can put that, as it were, out of the scenario. Okay?

A. Okay.

MR JUSTICE MALES: Number 2, you are told that ARIG has written a number of energy construction risks in the past between 1989 and 1993, but that it has written hardly any in 1994 and 1995. Okay?

A. Yes.

MR JUSTICE MALES: You are then shown the loss records at {D1/4/23}. Can we have those on the screen, please?

Incidentally, have you seen that document before?

A. I don't recall.

MR JUSTICE MALES: All right. Just to tell you what it is, it's some documents that ARIG gave to a different broker, Swire Fraser. Okay?

A. Mm.

MR JUSTICE MALES: So you are shown those. Take a moment to take in what information that gives you, and tell me when you have done that. (Pause)

Okay?

A. Okay.

MR JUSTICE MALES: Point 4, you are then given a year by year breakdown of those figures which is {D1/4/27}, which is think much the same information but in a bit more detail. Again, have a look at that and make sure you have got the picture which that gives you effectively in your mind.

(Pause)

Okay?

A. Yes.

MR JUSTICE MALES: Right. So you are given those figures, and then point number 5 in this scenario, you are told that although the loss figures for some of these underwriting years that you can see on the screen are very bad, as we can see in the figures, in 1991 there was a change of underwriter at ARIG and the new man in charge was adopting a more rigorous and selective approach to the risks which he was prepared to accept, and that quite a number of the risks which the previous underwriter had been prepared to accept would probably not have been accepted under the new approach.

Now, I'm not asking you to assume that you are given anything like, anything remotely like the schedule which Mr Blackwood took you through, but you are simply given the information in the kind of terms which I've got described it to you, and nothing more than that. Okay, you have those points in the scenario in mind?

A. Yes.

MR JUSTICE MALES: What would you have done?

A. I don't think I would have entered into a relationship with ARIG on that contract, simply because I did not, would not feel it necessary to give them a second chance on – because the company has demonstrated, not the underwriter, the company has demonstrated that they are not able to manage this business properly over time. If they allow an underwriter to do things like this, there is no controls, and just because it's being said there is a new underwriter, and maybe I am even adding point 6 to that, I am being shown the new underwriting guidelines, I mean, we have an expression in Germany saying "paper is very patient", I mean, you can put down the best intentions into an underwriting guideline… no I don't think I would have supported it.

MR JUSTICE MALES: Okay, I have that answer, thank you. All right, that completes your evidence, then. Thank you very much."